INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	8
Conclusion	25
Appendix	26

CITATIONS

Cases:

Brooklyn Bank v. *O'Neil*, 324 U.S. 697	16
Fleming v. *Miller*, 47 F. Supp. 1004, reversed, 138 F.2d 629, certiorari denied, 321 U. S. 784	20
Handler v. *Thrasher*, 191 F.2d 120	8, 22, 24
Lenroot v. *Interstate Bakeries Corp.*, 146 F.2d 325	8, 22, 24
McComb v. *Jacksonville Paper Co.*, 336 U.S. 187	6, 8, 17, 22-23
Michelsen v. *Penney*, 135 F.2d 409	25
Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U.S. 287	18
People v. *Sheffield Farms*, 225 N.Y. 25, 121 N.E. 474	24
Rutherford Food Corp. v. *McComb*, 331 U.S. 722	24
Schine Theatres v. *United States*, 334 U.S. 110	16
Tobin v. *Industrial Bank & Trust Co.*, E. D. Mo., Jan. 11, 1952	21
Tobin v. *Moore*, M. D. Ga., Jan. 5, 1952	21
United States v. *Darby*, 312 U.S. 100	15
United States v. *Radio Corporation of America*, 46 F. Supp. 654, appeal withdrawn, 318 U.S. 796	20
United States v. *Swift & Co.*, 286 U.S. 106	2, 8, 9-10, 11, 13-14, 15, 16, 17, 18, 20
Western Union Tel. Co. v. *International Brotherhood of Electrical Workers*, 133 F. 2d 955	20

Statutes:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U.S.C. *et seq.*	2
Sec. 3	26
Sec. 7	26
Sec. 15	27
Sec. 17	27

Statutes—Continued

Page

Fair Labor Standards Amendments, c. 736, 63 Stat. 910, 29 U.S.C., Supp. IV, sec. 217:
Section 17 17
Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84, 29 U.S.C. 251-262:
Section 6 7

Miscellaneous:

House Report 1453, 81st Cong., 1st Sess. 17

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 561

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

ALMA MILLS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on November 5, 1951.

OPINIONS BELOW

The opinion of the District Court (R. 8a-24a) is reported at 92 F. Supp. 728. The opinion of the Court of Appeals (R. 98-102) is reported at 192 F. 2d 133.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1951 (R. 102-103). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In 1940 a permanent injunction was entered against respondent restraining violations of overtime and other provisions of the Fair Labor Standards Act. In 1949 respondent, alleging that it had been in full compliance, moved that the injunction be vacated. On the basis of the undisputed fact that a number of employees in respondent's mill had worked overtime, without compensation, regularly and openly over a period of at least two years immediately prior to the filing of the motion to vacate, the trial court adjudicated respondent in civil contempt. Nevertheless, it vacated the injunction on the ground that the violations were unintentional and not willful. The court of appeals reversed the contempt adjudication and affirmed the dissolution of the injunction. The questions presented are:

(1) Whether, in the absence of any claim or showing by respondent of changed circumstances or special hardship, the permanent injunction can be dissolved consistently with the governing principles of *United States* v. *Swift & Co.*, 286 U.S. 106.

(2) Whether respondent is relieved of responsibility under the Act and from accountability in civil contempt for the admitted overtime work because its top management had issued instructions against and had no actual knowledge of such work.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor

Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U.S.C. 201 *et seq.*), are set forth in the Appendix.

STATEMENT

The present proceedings grew out of an action brought initially by the Administrator of the Wage and Hour Division to enjoin Alma Mills from violating the minimum wage, overtime compensation and other specified provisions of the Fair Labor Standards Act of 1938. There was no contest, and, with respondent's consent, the District Court, on August 23, 1940, entered a permanent injunction. (R. 1a-7a.)

There were no further court proceedings until March 16, 1949, when respondent filed its motion to vacate the judgment (R. 8a-9a). At a pretrial conference on this motion, the Administrator sought and was granted leave to make an investigation of appellee's operations prior to the hearing on the motion. Thereafter, on January 17, 1950, the Administrator filed his response, alleging that Alma Mills had violated the overtime compensation and certain other provisions of the injunction. It prayed that the motion to vacate the injunction be denied, and that the employer be adjudged in civil contempt. (R. 9a.)

The facts underlying the trial court's finding of civil contempt were undisputed, and may be summarized as follows:

Respondent, a corporation, employs over 400 persons in its cotton textile mill located in Gaffney, South Carolina, approximately 30 or 35 of whom

are women employed as spinners. One of the principal tasks of the spinners, in addition to repairing broken ends of thread and placing the roving in the frames as it is being spun, is to clean the various parts of the frames so that the lint will not accumulate and become entangled in the frames causing "slugs" and imperfections in the cloth or misalignment of the frame. (R. 18a; 70a, 71a, 75a, 31a, 34a-35a, 59a-60a.)[1] During the period from September 1946 to April 1949 (the period covered by the inspection), most of the spinners regularly began work at their frames prior to the time at which their assigned shifts began (R. 10a; 44a, 45a, 53a, 65a-66a). Because of the other duties entailed in keeping frames in proper operation, even veteran spinners of many years' experience felt hard pressed to perform the necessary clean-up work in the course of their regular shift (R. 10a; 46a, 53a, 54a, 60a, 62a). One testified she had been "cleaning up before work time 23 years" (R. 46a). Several spent an hour or more per day on this cleaning work (34a, 53a, 57a), in addition to the customary forty-hour workweek (36a-37a, 55a). None received any pay whatsoever for the extra time thus spent in the cleaning activities (37a, 55a), nor were records kept concerning this work (75a).

---

[1] References before the semi-colon are to the trial court's opinion; references after the semi-colon are to the supporting evidence.

The work in question was performed at the frames in the spinning department of respondent's mill while they were in normal operation, week after week over the period of approximately two and one-half years covered by the inspection. It was done openly in plain view, so that "anybody," including managerial or supervisory personnel, could have observed the work taking place "if they had looked" (R. 59a, 37a, 68a). The trial court accepted respondent's contention that instructions had been issued through the supervisory "second-hands"[2] against the performance of work in advance of regular shift hours (R. 74a, 24a), but it is undisputed that the instructions were not enforced and that the practice did not stop until April 1949, when there was an inspection of the mill by a representative of the United States Department of Labor (R. 88a).

---

[2] The second-hands of the different shifts gave varied accounts of their attitude and conduct in relation to the management's avowed "policy" against preshift work. Two (shift supervisors Duncan and Newton) testified that they were unable to observe whether employees on the succeeding shift were coming in early because of their own preoccupation toward the end of the shift with clerical work which had to be done at "a little office" away from the spinning room (R. 79a-80, 81a). The third (supervisor Lavender) testified that prior to April 1949 certain employees persisted in disobeying his instructions concerning preshift cleaning, but that finally in April 1949 he told them that if they did not "quit" he would report the matter to "higher authorities;" and this proved effective (R. 84a-86a).

Vice President Hamrick testified that while he often visited the spinning rooms, he was unaware of whether preshift work was being done because the spinners often changed shifts and therefore were not identified in his mind with any particular shift (R. 72a-73a).

Apart from respondent's allegations of compliance in its motion to vacate, its pleadings contain no allegations that changes in conditions and circumstances had occurred since the issuance of the injunction that would justify vacating the decree. Nor, except for its attempt to avoid responsibility for the above-described pre-shift work, did respondent introduce any evidence in support of the motion to vacate. Specifically, respondent made no allegation and offered no proof that the injunction was in any way hampering sale of its stock, that any such sale was contemplated, or that there had been any changes in corporate management or structure. On the contrary, respondent's counsel expressly conceded at the pretrial conference that there had been no corporate changes affecting this respondent, and that its stock was still owned by the interests that controlled it at the time of the issuance of the injunction (see *infra*, p. 12).

The trial court concluded that respondent had violated the terms of the injunction. While accepting respondent's assertion that this work was performed outside the regular shift hours "contrary to instructions * * * and without the knowledge or consent" of respondent, the court held that respondent "has committed civil contempt without regard to the question of whether the violations were intentional," because it is not necessary to show that "the alleged civil contempt was willfully committed by the contemnor," citing *McComb* v.

Jacksonville Paper Co., 336 U.S. 187 (R. 10a, 21a). It therefore ordered respondent to purge itself of contempt by making restitution of unpaid overtime compensation and paying a compensatory fine in the amount of the expense incurred for the investigation and presentation of the case (R. 23a). However, on the ground that respondent "has made bona fide efforts to comply" with the injunction and "did not intentionally or willfully violate," the district court ordered that the injunction be vacated (R. 23a-24a).

The Secretary of Labor appealed from the part of the judgment vacating the permanent injunction (R. 28a).[3] Respondent cross appealed from the part of the judgment adjudicating it in civil contempt and requiring payment of restitution and a compensatory fine (R. 29a).

The court of appeals held with respondent on both issues, reversing the adjudication in contempt and affirming the vacation of the injunction. It held that respondent could not be guilty of civil contempt in view of the finding that the work was performed without the knowledge and contrary to

---

[3] The Secretary also appealed from the part of the judgment which limited the restitution award to the period of two years preceding the contempt application, on the ground that section 6 of the Portal-to-Portal Act (c. 52, 61 Stat. 84, 29 U.S.C., Supp. IV, 255) "would apply to any action brought by the employees" and that the Administrator "must be limited in his recovery to that which the holder of the beneficial interest is entitled to" (R. 20a). This issue was not reached by the Court of Appeals because of its reversal of the adjudication in contempt. If certiorari is granted, we shall urge that the limitation period is inapplicable to the equitable remedies for civil contempt.

the instructions of respondent. As grounds for upholding the vacation of the injunction, the court of appeals cited, in addition to its conclusion that respondent had been in compliance over a period of years, "changes" in respondent's ownership and management which the appellate court assumed had occurred, and contemplated changes which the court said it was "told at the bar of the court" were being hampered by the continuance of the injunction.

REASONS FOR GRANTING THE WRIT

In both of its aspects, the decision below departs from established principles laid down by this Court. The ruling vacating the injunction is in conflict with *United States* v. *Swift & Co.*, 286 U.S. 106. The reversal of the contempt adjudication, which rests on the assumption that an employer who is inattentive or lax about labor conditions in his business can escape responsibility under the Act, and relieves the employer of the risk of even the civil sanctions of the injunction remedy, is inconsistent with *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, and is in conflict with the decisions of the Eighth Circuit in *Lenroot* v. *Interstate Bakeries*, 146 F. 2d 325, and of the Tenth Circuit in *Handler* v. *Thrasher*, 191 F. 2d 120.

Both rulings are of large importance in the administration and enforcement of the Fair Labor Standards Act. The ruling which denies the injunction the attributes of finality recognized by the *Swift* decision opens the door wide to needlessly

burdensome relitigation of outstanding injunctions, and raises serious enforcement problems not only under this Act but under other federal regulatory statutes in which Congress has provided the injunction as a means for enforcement. While this case arises under the Fair Labor Standards Act, the court below placed its decision on the broad ground, equally applicable to other statutes, that the *Swift* case does not require "that the consent decrees that the various administrative agencies have been obtaining should be extended in perpetuo against people who have been obeying the law over long periods * * *." (R. 102.)

1. In the *Swift* case, this Court, reversing the lower court's relaxation of a permanent consent decree, entered over ten years earlier in anti-trust proceedings, held that the discretion of a court of equity to remove restraints imposed by a final decree is limited. While recognizing the inherent "power of a court of equity to modify an injunction in adaptation to changed conditions," this Court stated that a final disposition of litigation by permanent injunction "will not lightly be undone at the suit of the offenders" 286 U.S. at 114, 120. The opinion emphasized the need to keep "in mind steadily the limits of inquiry proper to the case," the Court specifically noting that: "We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree." 286 U.S. at 119. The

scope of proper inquiry, said the Court, does not include "liberty to reverse under the guise of readjusting." *Ibid.* And general changes occurring merely by reason of the passage of time were expressly held inadequate grounds for relaxing the restraints. "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" (*id.* at 119), said this Court, or a showing that the injunction "has been turned through changing circumstances into an instrument of wrong" (*id.* at 115), would justify removing the restraints.

Instead of requiring defendant to make a showing of tangible circumstances justifying release from the permanent decree, as required in the *Swift* case, the decision below would place upon plaintiff the burden of again proving affirmatively the need for an injunction as if an original decree were being framed. This unprecedented departure from the *Swift* rule is particularly unjustifiable in this case where the trial court, on the basis of undisputed evidence showing at least laxity or negligence about compliance, found recent violations of the injunction.

Respondent in the instant case did not attempt to allege or prove "new and unforeseen conditions" or any "changing circumstances" which have converted the decree into "an instrument of wrong." On the contrary, apart from the plainly untenable assertion that the injunction was void *ab initio* (see district court's opinion, R. 12a-13a),

the only ground respondent advanced for its motion to vacate was that it had been in compliance with the injunction since its issuance. The district court, however, found to the contrary, and the reversal of this finding by the court of appeals, if not wrong (see Point 2, *infra*), is at least open to serious doubt.

In any event, none of the grounds relied upon by the court below to distinguish the *Swift* decision is well founded. Insofar as the decision below concludes that there was a showing of changed circumstances or special hardship, it rests upon unsupported and inaccurate factual assumptions. Equally untenable is the attempted distinction between injunctions to enforce the anti-trust laws and injunctions obtained by "various administrative agencies" to enforce what the court characterizes as a "mere regulatory statute" (R. 101, 102).

Apparently recognizing that at least some change in circumstances, other than the mere passage of time, should be necessary to justify upsetting a final decree, the court below departed from the record to supply this deficiency, stating that (R. 98, 101):

> * * * We were told at the bar of the court that the reason for the application was that the owners of the stock of the company wished to sell it and that the fact that the company was subject to the injunction was interfering with the sale. * * *
>
> * * * * * *

> * * * The continuance of the injunction was hampering the owners of the company in disposing of their stock * * *.
>
> * * * * *
>
> * * * The whole business atmosphere of most corporations as well as their ownership and management have undergone radical changes after the lapse of so long a period; and there is no reason to hold them subject to such an injunctive order when changes of this sort have occurred * * *.

The court of appeals must inadvertently have been misled by some statement at the oral argument,[4] for nothing in the pleadings or evidence supported such a claim. In fact, admissions by respondent's counsel at the pre-trial conference show the contrary.[5]

---

[4] Counsel for both parties do not recollect the statement referred to by the court, and are agreed that it is inaccurate insofar as the Alma Mills Company is concerned. The court of appeals may perhaps have been misled by evidence or statements regarding other companies under the same ownership which, however, were not involved in this appeal.

[5] In response to a specific question from the trial judge whether any changes had occurred in the status of Alma Mills and one of the other companies under joint ownership, respondent's counsel replied:

> Mr. McGHEE: Your Honor, they are under the same status that they were at the time of the entry of the judgment.
>
> The COURT: No corporate changes?
>
> Mr. McGHEE: No, sir.
>
> The COURT: What are the names of those?
>
> Mr. McGHEE: Alma Mills and Musgrove Mills.
>
> The COURT: They are owned by the Hamrick interests?
>
> Mr. McGHEE: Yes, sir, they are still owned by the Hamrick interests.

The transcript of the pre-trial conference was not included in

The record in the instant case is thus devoid of any support for the attempt by the court below to distinguish the *Swift* case as follows (R. 102):

> While the same corporations were in existence with the same potentiality for monopolizing trade and commerce they sought to have the decree amended by eliminating some of its key provisions. It was against this background that the Supreme Court held that the modification of the decree was not warranted because change in conditions had not been shown.

It is plain that respondent in the instant case is also still "in existence with the same potentiality" for violating the Fair Labor Standards Act.

Not only was the sweeping assertion of changed conditions by the court below contrary to the facts of the instant case, but the *Swift* decision itself specifically contradicts the assumption that a final decree may be relaxed merely because of general business changes brought on by the passage of time. In answer to the contention in the *Swift* case that "conditions in the packing industry and in the sale of groceries and other foods had been transformed so completely that the restraints of the injunction, however appropriate and just in February, 1920 [about a decade earlier], were now useless and oppressive," this Court responded that "Life is never

---

the record on appeal because it did not seem material in view of the admission that there had been no changes. The parties have agreed that this transcript may be made part of the record for purposes of review by this Court.

static, and the passing of a decade has brought changes to the grocery business as it has to every other." The question, however, is how significant the changes were with specific reference to the defendant, and whether defendant was "suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions," said the Court, "should lead us to change what was decreed after years of litigation with the consent of all concerned." 286 U.S. at 113, 119.

The other factual grounds cited by the opinion below as distinguishing the *Swift* case are equally without merit. The *Swift* opinion itself sufficiently answers the reference by the court below to the fact that only a relatively "few of a large number of employees" were involved in the alleged violations and that the questioned practices were "without the knowledge or consent of the company" (R. 100-101). In the *Swift* case, too, it was assumed that there were only "sporadic instances of unfair practices" which were "practices as to which the defendants' officers disclaim responsibility or knowledge." 286 U.S. at 118. Observing that "it is easy to make such excuses with plausibility when a business is so huge," the Court ruled that "the difficulty of ferreting out these evils and repressing them when discovered supplies an additional reason why we should leave the defendants where we find them, especially since the place where we find

them is the one where they agreed to be." *Id.* at 118-119.

Apart from these unsupported factual distinctions, the court below was apparently of the view that the full scope of the injunction remedy, as recognized in the *Swift* decision, is unnecessary to the enforcement of the Fair Labor Standards Act and other federal regulatory statutes. According to the opinion below, there is not the same need or justification for a continuing injunction where the person enjoined "has been guilty of nothing more than a violation of a mere regulatory statute." This view, we submit, reflects a serious misapprehension of the role of the injunction remedy in the enforcement of this and other regulatory statutes. It may be noted that the anti-trust laws are, of course, also within the category of "regulatory statute." And this Court itself has specifically recognized the similarity of purpose between regulation of unfair labor practices by this Act and the regulation of other types of unfair competition by the anti-trust laws. See *United States* v. *Darby*, 312 U. S. 100, 122, where it is pointed out that this Act is "directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair', *as the Clayton Act* has condemned other 'unfair methods of competition' made effective through interstate commerce" [emphasis supplied].

Thus the sound reasons underlying the *Swift* decision apply with equal force to the injunction rem-

edy under the Fair Labor Standards Act. The need to discourage relitigation of issues previously determined and to give some attributes of finality to an equity decree, the soundness of relieving the enforcement agency of the burden and expense of repeated investigation of and litigation with prior offenders, as well as the importance of protecting the courts from a flood of unnecessary litigation, are equally applicable to the Fair Labor Standards Act and other similar federal regulatory statutes.

There are indeed special reasons for applying the standards of the *Swift* case to injunctions under the Fair Labor Standards Act. The injunction is the only remedy now available to the Government "to require divestiture of [benefits] unlawfully acquired" by noncomplying employers. Cf. *Schine Theatres* v. *United States*, 334 U. S. 110, 128. This is the sole effective means for meeting one of the most difficult problems of enforcement of this Act—the problem arising from the fear on the part of complying employers, particularly in the highly competitive industries regulated by this Act, that their less law-abiding or less conscientious competitors will secure and retain substantial competitive advantage by periodic or sporadic noncompliance, whether intentional or not. As this Court has observed, the criminal remedies are "for wilful violations—difficult to prove" (*Brooklyn Bank* v. *O'Neil*, 324 U.S. 697, 709). Similarly, the effectiveness of the employee remedy is haphazard, depending upon the initiative of particular employees and

their willingness to risk incurring the disfavor of their employers. The injunction is the sole reliable remedy under the Act to prevent a prior offender from retaining advantages accruing from subsequent negligent or unintentional noncompliance. And it is now clear that the injunction must be outstanding in order for the restitution remedy to be available.[6] The restitution remedy has been the most effective spur to general voluntary compliance because it reduces to a minimum the danger of an unfair competitive advantage through noncompliance. As this Court has noted, it effectively places upon the employer "the risk of crossing the forbidden line" even though the court might find that he "had no purpose to evade the decree." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192, 193.

Since an injunction against an offender under this Act cannot be dissolved "without prejudice to the interests of the classes whom this particular restraint was intended to protect" (cf. *Swift* opinion, 286 U.S. at 117-118), there is no less, and perhaps greater, reason for applying the standards of

---

[6] The 1949 Amendment to Section 17 of the Fair Labor Standards Act expressly deprives the courts of jurisdiction to order restitution in an original action by the Government for an injunction (29 U.S.C., Supp. IV, 217, Appendix, *infra*, p. 27). The Conference Report on the compromise version of the 1949 Amendments, which was enacted, explains that this Amendment was not "intended in any way to affect the court's authority in contempt proceedings for enforcement of injunctions issued under section 17 for violations occurring subsequent to the issuance of such injunctions" (H. Rept. 1453, 81st Cong., 1st Sess., page 32).

the *Swift* case. Especially when it is considered that injunctions under this Act do not impose any restraint or obligation other than the basic requirements of the law impose in any event, the argument for more lenient standards fails. An injunction under this Act does not, as anti-trust and other kinds of injunctions often do, impose restraints upon conduct that would under some circumstances be legal.[7] In such cases there is obviously greater reason for flexibility and more occasion to relax restraints as conditions change. On the other hand, the sole purpose and effect of an injunction under this Act, so far as unintentional and non-willful violations are concerned, is simply to admonish a prior offender that he will not be permitted in the future to retain any benefits accruing from his noncompliance but will be obliged to make amends.

The implication in the opinion below that a continuing injunction under this Act imposes an undue burden and hardship derives from a wholly unrealistic view of the actual effect of such injunctions. The potentiality of criminal contempt, to

---

[7] Thus even though it appeared that the injunction in the *Swift* case imposed "restraints upon the exercise of powers that would normally be" within the defendant's legal rights (286 U.S. at 119), it was held an abuse of discretion to modify such restraints in the absence of "a clear showing of grievous wrong evoked by new and unforseen conditions" *Ibid.* Cf. also *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 299, where the Court in upholding an injunction restraining peaceful picketing stated that inasmuch as this restricted the right of free speech the injunction could later be modified upon a proper showing that the dangers of violation had ceased.

which the court below referred, is plainly no reason for regarding the injunction as too burdensome, because criminal penalties cannot be invoked in a contempt proceeding without proof of willfulness and the same burden of proof rests on the Government as in any other criminal prosecution. In any event, the potentiality of criminal violation is certainly no reason for leniency in relaxing an injunction. The only "additional penalties" to which an employer is subjected by the pendency of an injunction are the strictly civil remedies of restitution of unpaid wages and of the expenses of enforcement by way of compensatory fine. There is no doubt that the injunction with its tangible remedy of restitution serves as a deterrent over and beyond the bare prohibitions of the statute. As expressed by the officials of the company involved in this very case, "any management that has an injunction over them are not going to promiscuously let people violate the laws when there is nothing to be gained by the company by those violations" (Tr. 121); the injunction induces the employer to take "extra precaution to be sure" that subordinates strictly adhere to the requirements (Tr. 129-130). It is this extra degree of precaution that is of utmost importance in enforcing the Act against prior offenders. Except in rare cases the protection given employees, competitors and the public by the purely restorative remedies af-

forded by a continuing injunction far outweighs any burden thus placed on an employer.[8]

The sound limitations of the *Swift* decision have heretofore been consistently followed by the lower courts. See *United States* v. *Radio Corp. of America,* 46 F. Supp. 654 (D. Del.), appeal withdrawn, 318 U. S. 796; *Fleming* v. *Miller,* 47 F. Supp. 1004 (D. Minn.), where the one respect in which the district court modified the decree was reversed on appeal, 138 F. 2d 629 (C.A. 8), certiorari denied, 321 U.S. 784; *Western Union Tel. Co.* v. *International Brotherhood of Electrical Workers,* 133 F. 2d 955 (C.A. 7) where the court of appeals held it error to dissolve a labor dispute injunction issued nearly 20 years earlier. The only cases suggesting that the passage of time without misconduct might justify relaxation of a decree are cases where the circumstances had so changed since the issuance of the injunction that the conduct enjoined was no longer unlawful, such as, for example, cases involving restraints on peaceful picketing or the right to carry on one's business or to use one's property in a particular manner. The decisions cited by the court below are cases of this

[8] To analogize this relatively mild remedy to the criminal probation and parole laws, as the court below did, is to reveal the error in the court's reasoning. The injunction places no burden on defendant to report periodically to the court or to any other public official, it does not require defendant to remain within the confines of any particular jurisdiction or impose any other restraints upon defendant's freedom of action, and certainly does not carry any of the stigma of a criminal on probation.

type. None of them holds that a restraint upon conduct still unlawful should be relaxed in the absence of a clear showing of changed circumstances causing special hardship.

The ruling below, if permitted to stand, introduces large areas of uncertainty in the present enforcement procedures. If a permanent injunction may be dissolved merely because of the passage of time without further violation, how long a time suffices? And must the Government necessarily assume the burden in each case of again investigating and proving that there has been further violation? Is it to be irrelevant that the defendant fails to show that the passage of time has worked such a change in conditions as to make continuance of the injunction a hardship?

It may be expected that the decision below will encourage the filing of motions to vacate.[9] The Government, of course, cannot allow the injunctions to be dissolved without at least investigating the employer's current conduct. Thus, of necessity, it appears that the burden and expense of investigating and proving further violations would be on the Government.

The extent of the additional enforcement problem thus created by the ruling below may be judged

[9] Two district courts during the past month have already granted such motions to vacate on the authority of the *Alma Mills* decision below. *Tobin* v. *Industrial Bank & Trust Co.*, E.D. Mo., Civil Action No. 1674 (January 11, 1952); *Tobin* v. *Henry F. Moore*, M.D. Ga., Civil Action No. 57 (January 5, 1952).

from the fact that there are over 6000 injunctions outstanding, although this comprises less than 1% of the total number (over 700,000) of employer establishments covered by the Act. Since the appropriations for enforcement provide funds for inspections of only a small fraction of the total number of covered establishments, the inspection program must be most selectively planned. Because the pendency of an injunction affords an added deterrent, it has in the past served as a dependable means of reducing the number of necessary investigations. The decision below would serve to increase rather than reduce the number of necessary investigations. It could easily result in diverting a disproportionate part of the personnel and appropriation available for investigation and enforcement to the task of defending motions to dissolve pending injunctions. Since the timing and number of dissolution proceedings are wholly out of the control of the administrative agency, this would seriously strain and disrupt the available enforcement facilities.

2. The reversal of the adjudication in civil contempt rests on reasoning inconsistent with this Court's decision in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, and in conflict with decisions of the Eighth Circuit in *Lenroot* v. *Interstate Bakeries Corp.*, 146 F. 2d 325, and of the Tenth Circuit in *Handler* v. *Thrasher*, 191 F. 2d 120.

Although the opinion below disclaims inconsist-

ency with the *Jacksonville Paper* decision, it holds in effect that an employer on whose premises work is regularly performed without payment in accordance with the statutory standards can escape all civil accountability under the Act and under the injunction through laxity and inattention to labor conditions in his business. This result seems clearly inconsistent with the reasoning in the *Jacksonville Paper case,* that conduct "does not cease to be a violation of a law and of a decree merely because it may have been done innocently" 336 U.S. at 191. The employer, which had already shown a "proclivity for unlawful conduct" (*Id.* at 192), was directly "alerted by the decree" against any "program of experimentation with disobedience of the law", and therefore assumed "the risk of crossing the forbidden line", even though the court might find that he "had no purpose to evade the decree" *Id.* at 192, 193. The very purpose of the injunction remedy, after a violation of the Act has occurred and been proved, is to place upon the employer the risks of further noncompliance and to provide suitable remedial relief for negligent and mistaken conduct even if not sufficiently blameworthy to warrant punitive sanctions. The Act, no less than the decree, "was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute." (See 336 U.S. at 191.)

The ruling that work performed without the actual knowledge of the employer and contrary to his instructions is not employment within the statutory definitions would relieve an employer of responsibility for enforcement of his instructions and would place a premium on lax, negligent conduct. The statutory definition of "employ" is derived from the definitions of the state child labor laws (see *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 728, n. 7), which have been interpreted as placing a "personal duty" upon the employer "to inquire into the conditions prevailing in his business"—he "must neither create nor suffer in his business the prohibited conditions" (See *People* v. *Sheffield Farms,* 225 N. Y. 25, 29, 121 N. E. 474, 476). In the *Interstate Bakeries* case, the Eighth Circuit, following the *Sheffield Farms* interpretation of the employer's responsibility under the State statute, held that defendant corporation and its officials were responsible under the Act for work performed by minors in their business despite the trial court's finding that such work was neither authorized nor known by them, and was contrary to the declared policy of the corporation. Similarly, the Tenth Circuit in *Handler* v. *Thrasher* held an employer responsible for unauthorized overtime work performed by an oil pumper despite an express agreement that no overtime work was to be done without the employer's consent. This construction of the Act accords with

the generally recognized common-sense view that a businessman is accountable for facts he would have discovered by reasonable observation or inquiry into his operations. If he is not held thus accountable, the employer "inattentive to duty will secure greater and greater exemption from liability." Cf. *Michelsen* v. *Penney*, 135 F. 2d 409, 418 (C.A. 2).[10]

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

WILLIAM S. TYSON,
Solicitor of Labor.

JANUARY 1952.

---

[10] Despite the findings in the instant case of lack of authorization or knowledge, there is abundant uncontradicted evidence in the record on which to hold the employer civilly accountable. The work was performed openly in appellee's mill while it was in operation, within plain view of the supervisory personnel, for a period of at least two and one-half years, i.e., as far back as the inspection went (R. 59a, 37a, 68a). It was done regularly by virtually all the spinners. Though high management theoretically forbade it, nothing effective was done to terminate the practice until April 1949, when a representative of the United States Department of Labor inspected the plant in connection with respondent's motion to dissolve the injunction.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U.S.C. 201.

SEC. 3. As used in this Act—

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the

hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 15 (a) After the expiration of one hundred and twenty days from the date of the enactment of this Act, it shall be unlawful for any person—

* * * * *

(2) to violate any of the provisions of section 6 or section 7 * * *;

* * * * *

SEC. 17. The district courts of the United States * * * shall have jurisdiction, for cause shown, * * * to restrain violations of section 15: *Provided,* That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 985796 687